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No. 85-1347

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

GEORGE F. RITCHIE,
Respondent.

ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex. rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL and the STATES OF COLORADO, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MINNESOTA, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WYOMING

Attorneys for Amici Curiae State of California ex. rel. John K. Van De Kamp, Attorney General

JOHN K. VAN DE KAMP
Attorney General
STEVE WHITE, Chief
Assistant Attorney General
ARNOLD OVEROYE
Assistant Attorney General
JOEL CAREY, Supervising
Deputy Attorney General
KAREN ZISKIND
Deputy Attorney General
Counsel of Record
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5264

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Duane Woodard
Attorney General
State of Colorado

Stephen E. Merrill
Attorney General
State of New Hampshire

Joseph Lieberman
Attorney General
State of Connecticut

Lacy H. Thornburg
Attorney General
State of North Carolina

Corinne Watanabe
Acting Attorney General
State of Hawaii

Mike Turpen
Attorney General
State of Oklahoma

Neil F. Hartigan
Attorney General
State of Illinois

LeRoy S. Zimmerman
Attorney General
State of Pennsylvania

Linley E. Pearson
Attorney General
State of Indiana

Mike Cody
Attorney General
State of Tennessee

David Armstrong
Attorney General
State of Kentucky

David L. Wilkinson
Attorney General
State of Utah

William J. Guste, Jr.
Attorney General
State of Louisiana

Jeffrey L. Amestoy
Attorney General
State of Vermont

James E. Tierney
Attorney General
State of Maine

William A. Broadus
Attorney General
State of Virginia

Hubert H. Humphrey III
Attorney General
State of Minnesota

Kenneth O. Eikenberry
Attorney General
State of Washington

Edwin L. Pittman
Attorney General
State of Mississippi

Charlie Brown
Attorney General
State of West Virginia

Michael Greely
Attorney General
State of Montana

Archie G. McClintock
Attorney General
State of Wyoming

QUESTION PRESENTED

Do the Sixth Amendment rights of confrontation and compulsory process require unrestricted disclosure of presumptively privileged information in child welfare service files without an initial showing of materiality and a judicial *in camera* examination?

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Amici file this brief pursuant to Rule 36.4 of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of petitioner who

urges reversal of Commonwealth v. Ritchie, 502 A.2d 148 (Pa. 1985).

The Pennsylvania Supreme Court's expansion of the principles announced in Davis v. Alaska, 415 U.S. 308 (1974) is in conflict with federal statutes and seriously undermines the states' interests in protecting children.

Amici, along with numerous other states, have enacted child abuse laws similar to those enacted by Pennsylvania. These laws must comply with federal statutes and regulations which condition eligibility for grants-in-aid on the states' ability to keep child abuse reports and records confidential. The Pennsylvania court's ruling impairs the states' ability to comply with this requirement.

The states also have an interest in protecting and promoting the welfare of children and preventing their mistreatment. The confidentiality of child abuse reports and records is essential in carrying out this vital function.

Moreover, the Pennsylvania decision drastically impairs the states' ability to protect common law and statutory confidential communications generally.

For these reasons, amici oppose Mr. Ritchie's contention that he has a Sixth Amendment right through his attorney of unrestricted access to confidential records regarding the child-victim and her family.

SUMMARY OF ARGUMENT

The Congress of the United States has recognized the problem of child abuse and the need for additional federal efforts to combat it. Congress has thus made funds available to the states for child abuse programs. In order to receive these funds, states must provide that child abuse reports and records are confidential. All fifty states have enacted such laws. The holding of the Pennsylvania Supreme Court conflicts with the federal requirement of confidentiality.

Confidentiality of records is critical to the success of the states' child protection laws. Confidentiality encourages reports of child abuse, enhances investigations and encourages families to seek treatment for their problems. Without confidentiality, the

states are seriously hampered in providing these services to children and their families.

States also have a duty to protect the privacy of the victim. Child abuse files often contain sensitive and personal information about the child and his/her family. The criminal defendant should not be entitled to immaterial private information.

In deciding whether a criminal defendant should have access to child abuse records, the court should balance the defendant's right of access to evidence material to his defense against the public's interest in preventing and treating child abuse and the child's privacy interests. If access is granted, the court should then undertake an <u>in camera</u> review of

the record and allow disclosure of only favorable evidence which is material to guilt, exculpatory evidence, or evidence material to cross-examination. Protective measures should also be taken directing that the information be disclosed only in connection with the current proceedings and that the records be sealed for appellate review.

ARGUMENT

I

THE STATES' INTERESTS IN PRESERVING THE CONFIDENTIALITY OF CHILD WELFARE SERVICE RECORDS ARE COMPELLING.

A. The Decision Of The Pennsylvania Supreme Court conflicts with Federal and State Requirements Of Confidentiality.

(1) The Federal Statutes

In 1974, Congress passed the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (codified as amended at 42 U.S.C.§§ 5101-5107 (1984). The legislative history indicates Congress recognized that thousands of innocent children are beaten, burned, poisoned or otherwise abused by adults each year. (H.R. Rep. No. 685, 93rd Cong., 1st Sess. 2, reprinted in 1974 U.S. Code Cong. & Ad. News 2763-2764.) Witnesses who

testified agreed that estimates available of the incidence of child abuse represent only a small proportion of the number of children who are actually maltreated. The National Center for the Prevention and Treatment of Child Abuse and Neglect in Denver, Colorado, estimated that 60,000 cases of child abuse are reported annually. (Id. at 2764-2765.)

The Act was passed in response to the growing problem of child abuse, the inadequacies of existing prevention and treatment programs at the state level, and the need for a national clearinghouse to compile statistics and provide direction for improvement of child abuse programs. (Id. at 2764-2766.) Congress provided funds to states for the purpose of assisting them in

developing, strengthening and carrying out child abuse and neglect prevention and treatment programs. (See 42 U.S.C. § 5103(b).)

In order to qualify for federal assistance, Congress required states to include certain provisions in their child abuse and neglect laws. These include providing "methods to preserve the confidentiality of all records in order to protect the rights of the child and the child's parents or guardians; . . ." (42 U.S.C. § 5103(b)(2)(E).)

The regulations which implement the Act also require the participating state to provide by statute that all records and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal

offense. (See 45 CFR § 1304.14(i)(1) (1985).) The regulations further provide that a state may authorize disclosure to a narrow class of persons and agencies under limitations and procedures determined by the state. (See 45 CFR § 1340.14(i)(2)(i)-(xi) (1985).) In addition, 45 CFR section 1340.20 requires that the state hold as confidential "all information related to personal facts or circumstances about individuals" involved in child abuse programs or projects. Disclosure of personal information is not allowed, except to those agencies and persons delineated in 45 CFR section 1340.14(i)(2)(i)-(xi).

Further, 42 U.S.C. section 5103(b)(4) requires that programs under Title IV, Parts A and B of the Social Security Act, 42 U.S.C.

section 601 et seq. and section 620 et seq. (Aid to Families with Dependent Children and Child Welfare Services, respectively), comply with the confidentiality requirement set forth in 42 U.S.C.§ 5103(b)(2)(E). Child abuse programs are often administered under the above provisions of the Social Security Act.

The unrestricted access by a criminal defendant to an agency's child abuse files violates these federal statutes and regulations and frustrates Congress' intent to limit access to this information. If a criminal defendant is granted access to a file, the federal mandate of confidentiality requires the court to provide the least intrusive method of disclosure. The court must take steps to preserve

confidentiality to the greatest extent possible.

(2) The States' Statutes [1]

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1. Amici all have mandatory reporting laws and statutes providing confidentiality for child welfare service files:

Colorado (Colo. Rev. Stat. §§ 19-10-103; 19-10-115); Connecticut (Conn. Gen. Stat. Ann. §§ 17-38a, 17-38b, 17-38c, 17-47a, 17-431); Hawaii (Hawaii Rev. Stat. §§ 350-1.1, 350-6); Illinois (Ill. Rev. Stat. ch. 23, §§ 2054, 2061, 5035.1); Indiana (Ind. Code §§ 31-6-11-3, 31-6-11-18); Kentucky (Ky. Rev. Stat. § 199.335); Louisiana (La. Rev. Stat. Ann. § 14:403, 46:56); Maine (Me. Rev. Stat. Ann. tit. 22, §§ 4011, 4008); Minnesota (Minn. Stat. Ann. § 626.556); Mississippi (Miss. Code Ann. § 43-21-353, 257, 259, 261, 267); Montana (Mont. Code Ann. §§ 41-3-201, 205); New Hampshire (N.H. Rev. Stat. Ann. §§ 169:40, 169-C:29, 169:44, 169-C:25, 169-D:25); North Carolina (N.C. Gen. Stat. §§ 7A-543, 115C-400, 7A-552, 7A-675); Oklahoma (Okla. Stat. Ann. tit. 21, § 846); Pennsylvania (P.S. §§ 2204-2214; 2215(a)); Tennessee (Tenn. Code Ann. §§ 37-1-403, 37-1-605, 37-1-408, 37-1-409, 47-1-612; Utah (Utah Code Ann. §§ 78-3b-3, 78-3b-3.5, 78-3b-4, 78-3b-13); Vermont (Vt. Stat. Ann. tit. 33, § 683, 686); Virginia (Va. Code, §§ 63.1-248.3, 63.1-209); Washington (Wash. Rev. Code Ann. § 26.44.030, 26.44.070); West Virginia

California's child abuse statutory scheme was enacted in response to findings similar to Congress', and in compliance with the federal requirement of confidentiality. In 1981, the California Legislature enacted the Office of Child Abuse Prevention. In so doing it declared:

"[C]hild abuse and neglect is a severe and increasing problem in California" (Welf. & Inst. Code,

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(W.Va. Code §§ 49-6A-2, 49-6A-5); Wyoming (Wyo. Stat. §§ 14-3-205, 14-3-207, 14-3-214).

§§ 18950, 18975.1(a)). 2/ It further found that:

> "(a) child abuse is one of the most tragic social and criminal justice issues of our times.
>
> "(b) [v]ictims of child abuse and their families face a complex intervention system involving many professionals and agencies.
>
> "(c) The prevention of child abuse requires the involvement of the entire community." (Welf. & Inst. Code, § 18981(a), (c), and (d).)

On the basis of these findings, a complex and comprehensive statutory scheme was enacted to help plan, develop, and carry out programs to prevent, identify, and treat child abuse and neglect. (Office of Child

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2. In 1983, 126,855 reports of child abuse were made (Calif. Dept. of Justice, Comm. on the Enforcement of Child Abuse Laws). In 1984, 250,314 reports were made (DSS Emergency Response Program Statistical Report). In 1985, 295,570 reports were made. (Id.)

Abuse Prevention, Welf. & Inst. Code, § 18958 et seq.; Child Abuse Prevention Coordinating Councils, Welf. & Inst. Code, § 18982 et seq., Child Abuse Reporting, Pen. Code, § 11166.)

The Department of Social Services and the County Welfare Departments have the task of establishing and operating child welfare resource programs. (Welf. & Inst. Code, § 16500 et seq.) The primary concern of Child Protective Services is not law enforcement but the protection of the child, i.e., removal of the child from the home, if necessary, and placement in therapy and rehabilitative programs. (Welf. & Inst. Code, §§ 358.1, 16501.)

California's reporting laws were enacted to facilitate the investigation of child abuse as well as

the protection of children. (Pen. Code, § 11174.5; People v. Stritzinger, 34 Cal.3d 505 (1983).) These laws impose a mandatory duty upon any child care custodian, medical and non-medical practitioner or employee of a child protective agency to report known or suspected child abuse (Pen. Code, § 11166(a).) These laws also encourage reporting by other persons who know or suspect instances of child abuse. (Pen. Code, § 11166(d).)

The reports required by Penal Code section 11166 must be made to a child protective service (CPS) agency, which is defined as "a police or sheriff's department, a county probation department, or a county welfare department." (Pen. Code, § 11165(k).) The reporting laws also require cross-reporting between these

agencies so that both law enforcement and social service agencies are notified of the child abuse. (Pen. Code, § 11166(g).) The reports must include the name of the person making the report, the name and location of the child, and any information that led the person to suspect the abuse. (Pen. Code, §1116.)

Governmental files on abused children fall into three general categories: (1) law enforcement files, (2) juvenile court records, and (3) child welfare service (CWS) files. Law enforcement files contain the reports mandated by Penal Code section 11166. (Pen. Code, § 11165(k).) The juvenile court files contain interviews with the abused child (Welf. & Inst. Code, §328) as well as a social study prepared by the probation officer and

any study by an appointed child advocate. (Welf. & Inst. Code, § 358.) The social study will include reports, interviews and observations covering the subjects of child protective services, return of the child, visitation rights with grandparents, and termination of parental custody. (Welf. & Inst. Code, § 358.1.)

The contents of CWS files are governed by regulation. (California-DSS-Manual-SS, Div. 30, Regul. 30-276, 30-376, 30-476.) The files include the initial report (Pen. Code, § 11166), as well as information on the abused child and the child's family, covering social, cultural, psychological, and physical factors. (Id., Reg. 30-276.1, 30-376.1, 30-476.) The files also include applications for social

services, eligibility determination documents, medical and dental reports, and emergency shelter care, placement and foster care records. (Id.) In cases where the child has a history of juvenile court involvement, the CWS file also contain all documents submitted to and received from the court. (Id., Reg. 30-276.2, 30-376.2.)

Files on child abuse victims are confidential by statute. Welfare and Institutions Code section 827 creates a conditional privilege for juvenile court records (T.N.G. v. Superior Court, 4 Cal.3d 767, 778-781 (1971); Wescott v. Yuba County , 104 Cal.App.3d 103 (1980)), while Welfare and Institutions Code section 10850 protects the confidentiality of CWS records. (Foster v. Superior Court, 107 Cal.App.3d 218, 228 (1980).

However, the disclosure provisions governing welfare (CWS) files are more restrictive than those governing juvenile court records. Because of the federal mandate of confidentiality for CWS files (42 USCA § 5103(b)(2)(E)), Welfare & Institutions Code section 10850, subdivision (a), limits disclosure of CWS records "for any purpose not directly connected with the administration of such program . . . ." The disclosure of any information which identifies by name or address any applicant or recipient is also prohibited. (Welf. & Inst. Code, § 10850(a).)

The initial abuse reports required by Penal Code section 11166 are also confidential, as is the identity of the reporter. Disclosure of these reports is strictly limited to

persons or agencies whose interests are in protecting the child. (Pen. Code, §§ 11167(c), 11167.5.)

In addition, California extends protection by statute to confidential communications between doctor-patient (Evid. Code, § 992), psychotherapist-patient (Evid. Code, § 1014), mental health counselor-minor (Evid. Code, § 1014.5), and sexual assault counselor-victim (Evid. Code, § 1035.8)

Moreover, California's statutory scheme sets forth procedural protections when the defense seeks disclosure of privileged information. Evidence Code section 1040 sets forth the means by which a public entity may assert a claim of confidentiality or governmental privilege. (Pitchess v. Superior Court, 11 Cal.3d 531, 538

(1974).) This section establishes two different privileges: an absolute privilege in which disclosure is forbidden by an act of Congress or a state statute (Evid. Code, § 1040(b)(1)), and a conditional privilege in which disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice." (Evid. Code, § 1040, subd. (b)(2); People v. Superior Court, 19 Cal.App.3d 522, 526 (1971).)

When a court is ruling on a claim of privilege under Evidence Code section 1040 and is unable to resolve the matter without requiring disclosure of the information claimed to be privileged, the court may require

disclosure of the alleged privileged information in an in camera hearing. (Evid. Code, § 915(b).)

The decision whether or not to employ this procedure is committed to the sound discretion of the trial court. (Johnson v. Winter, 127 Cal.App.3d 435, 440 (1982).) However, the burden of demonstrating the need for confidentiality rests on the agency claiming the privilege. (Ibid.; In re Muszalski, 52 Cal.App.3d 475, 483 (1975).) If an in camera hearing is the only means available to the agency to meet its burden, it is an abuse of discretion not to hold such a hearing and segregate the privileged from the non-privileged material. (Johnson, supra, at p. 440; Muszalski, supra, at p. 483.)

B. Unrestricted Disclosure Of Confidential Records Will Impair The States' Ability To Protect Children And Will Violate The Child's Right Of Privacy.

The confidentiality provisions of California's child abuse statutes protect two categories of interests: societal interests and individual interests. The societal interests in protecting children from crime devolve upon the government's three-fold ability to prevent and investigate crime and to rehabilitate the child. These three goals can only be achieved by encouraging the free flow of information without fear of disclosure. Also at stake are the individual privacy interests of the child which are inherent in the

numerous confidential relationships which are probed and revealed in the CWS files.

Relying on Davis v. Alaska, 415 U.S. 308 (1974), the Pennsylvania Supreme Court in Commonwealth v. Ritchie, supra, ruled that Mr. Ritchie's Sixth Amendment rights compelled disclosure of presumptively privileged CWS records without the protection of a judicial in camera hearing. Amici submit that Davis does not require such broad access to privileged information.

In Davis v. Alaska, supra, this Court held that a defendant's Sixth Amendment right to confrontation required that defense counsel be allowed to impeach the credibility of the prosecution's key witness by showing the witness had a juvenile

record and was therefore potentially biased.

The defendant in Davis was on trial for burglary. The prosecution's eye witness, Richard Green, was a 17 year old who had a juvenile record of burglary. Defense counsel sought to impeach Green by introducing evidence of his juvenile and probationary record, not to impeach his credibility generally, but to show his bias and motive to lie. The prosecution obtained a protective order to prevent counsel from bringing even the fact of Green's juvenile record before the jury.

This Court conducted a careful balancing in Davis, and concluded that by limiting the scope of cross-examination of Green, the jury was prevented from judging the accuracy

and truthfulness of his testimony. The state's policy of protecting juvenile offenders must give way under these circumstances. Whatever temporary embarrassment might result to the offender is outweighed by a defendant's right to probe into the influence of possible bias on cross-examination of a crucial witness.

The case before this Court is clearly distinguishable. First, the degree of intrusion permitted by Davis does not begin to approach that sought by respondent Ritchie herein: Davis merely allows disclosure of the fact of a juvenile adjudication, whereas Ritchie seeks unrestricted access to the entire CWS file. Second, the state's interests in Davis were less compelling than those asserted by amici herein. The states' interests favoring

confidentiality of juvenile records are based on notions of fairness to the juvenile in avoiding the stigma of criminality and assisting in rehabilitation. (Davis v. Alaska, supra, 415 U.S. 308.) These concerns are even more compelling in the case at bench where the child being protected is the victim of the crime.

The relative social utility of privileged information can be measured by the importance the community attaches to the relationship and the damage that disclosure would inflict on that relationship. (30 Stanford Law Rev. 935, 941-942 (1978).)

Here, the states' interests in protecting the welfare of its children are clear and compelling (Prince v. Massachusetts, 321 U.S. 157 (1944); Wisconsin v. Yoder, 406 U.S.

205 (1972).[3]) In fact, this Court has stated "[t]here is no more worthy object of the public's concern." (Wyman v. James, 400 U.S. 309 (1971).) In the 1982 funding for the Office of Child Abuse Prevention (Stats. 1982, Ch. 1398, § 1, p. 1134), the California Legislature made similar findings and declarations:

> "(a) Children are a precious resource in this county and in this state.
>
> "(b) Persons abused and neglected as children are

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3. This Court has noted that removal of parental rights is a penalty as great as, if not greater than, a criminal penalty. Nevertheless, the state's interest in preserving and promoting the welfare of the child may warrant severance of that relationship. (Lassiter v. Department of Social Services, 452 U.S. 18 (1981).)

> prone to commit violent crimes as adults.
>
> "(c) Child abuse and neglect prevention programs help protect children, stabilize families, and contribute to the reduction of crimes."

The California Legislature has repeatedly demonstrated its concern for victims by adopting programs to compensate victims (Gov. Code, §§ 13959-13964, 29632-29636) and render their contacts with the criminal justice system less painful. (Pen. Code, §§ 13835-13846; Barela v. Superior Court, supra, 30 Cal.3d 244, 253.)[4/]

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4. California Penal Code section 288, subdivision (c), requires the court, in any prosecution for lewd and lascivious acts with a child under the age of 14, to "consider the needs of the child victim and . . . do whatever is necessary and constitutionally permissible to prevent psychological harm to the child victim."

The reporting laws embody the strong public policy encouraging prompt investigation and prosecution of child abuse. (People v. Stritzinger, supra, 34 Cal.3d 505; Barela v. Superior Court, supra, 30 Cal.3d 244.) "The state has repeatedly emphasized that its citizens have a duty to protect children from abuse." (Id. at p. 254.) However, this duty is dependent upon the individual citizen's willingness to report abuse. Confidentiality assures the reporter's protection from reprisals and encourages him to perform his duty. (Riviaro v. United States, 353 U.S. 53 (1957).) The threat of disclosure will only have a chilling effect on the flow of this information.

Moreover, the rehabilitation of the child depends upon the confidentiality of child abuse reports and CWS

files. In-depth probing by CWS workers is necessary to assess and aid the child toward rehabilitation (DSS - Manual - SS - Div 30, Regs. 276, 376, 476). The child, in turn, must feel free to express his innermost feelings to the worker without fear of reprisal from his abuser or family. In addition, the confidentiality of CWS files provides protection from public exposure and prevents embarrassment to the victim. Disclosure of CWS files must therefore be limited to ensure the flow of this information.

The mental health of a society is dependent on the mental health of its children. Society therefore has a compelling interest in protecting its children and encouraging the identification of child abuse and the rehabilitation of the child. These

goals cannot take place if the child feels constrained in communicating with the CWS worker or any of the other professionals who assist in the protection and rehabilitation process. Likewise, disclosure of the reporter's identity will only inhibit prompt reporting.

Unrestricted disclosure of CWS files also violates the privacy rights of the child and his family. While some view communication privileges as exclusionary, truth restricting devices, a more positive view is offered by Professor Louisell who "stresses instead that privileges are vital protections of honor, conscience and privacy, and that their exclusionary effect 'is merely a secondary and coincidental feature of the privilege's vitality.'" (Louisell,

Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today, 31 Tul.L.Rev. 101 (1956); Stan.L.Rev. supra, pp. 943-944.) This view requires greater attention to the potential injury to the particular privilege holder, especially where the privilege protects existing relationships which fall within the "zone of privacy."

The constitutional right of privacy which emanates from the penumbra of the Bill of Rights under the First, Ninth, and Fourteenth Amendments (Griswold v. Connecticut, 381 U.S. 479 (1965)) protects "the individual interest in avoiding disclosure of personal matters." (Whalen v. Roe, 429 U.S. 589, 599 (1977).)

This Court has recognized liberty interests in matters of family life and family relationships (Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); (Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); (Santosky, et al. v. Kramer (1982) 455 U.S. 745); (Stanley v. Illinois, 405 U.S. 645 (1972)) as well as the fundamental right to satisfy intellectual and emotional needs in the privacy of one's home (United States v. Twelve 200-Ft. Reels of Super 8MM Film, 413 U.S. 123, 127 (1973)).

This Court has also extended the right of privacy to a fundamental relationship outside the family, where it concerned fundamental personal matters, namely, the doctor-patient relationship (Griswold v. Connecticut,

supra, 381 U.S. 479; Roe v. Wade, 410 U.S. 113 (1973)). Other courts have recognized a conditional right of privacy in the psychotherapist-patient (United States v. Lindstrom, 698 F.2d 1154 (8th Cir. 1983); Caesar v. Mountanos, 542 F.2d 1064 (1976).)

The People of the State of California have expressly retained the right of privacy (Art. I, § 1 of the Calif. Const.), which was intended to expand the privacy rights already in existence. (Board of Medical Quality Assurance v. Gherardini, 93 Cal.App.3d 669 (1979).) One of the four "mischiefs" this constitutional provision was directed at was "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to a

third party." (White v. Davis, 13 Cal.3d 757, 775 (1975).)

Accordingly, California's right of privacy has been found to exist [under the California constitutional provision] in the doctor-patient relationship (Board of Medical Quality Assurance v. Gherardini, supra), the psychotherapist-patient relationship (In re Lifschutz, 2 Cal.3d 415, 431-432 (1970); McKirdy v. Superior Court, 138 Cal.App.3d 12 (1982)), between students and teachers during classroom discussion (White v. Davis, 13 Cal.3d 757) (1975)), and in marital communications (North v. Superior Court, 8 Cal.3d 301 (1972)).

CWS files contain "personal matter" (Whalen v. Roe, supra, 429 U.S. 589) which falls within the "zone of

privacy." The records contain information pertaining to the victim's social, medical and psychological life, as well as sensitive and private material from and about other members of the victim's family. Communications between the victim and the CWS worker, like the psychologist, will involve intimate matters on these subjects.

Consequently, the information within these files may involve matters which are far more personal than those shared between doctor and patient. The doctor-patient relationship generally involves concerns of the body. The psychotherapist-patient and CWS worker-child relationships, however, involve the individual's most personal thoughts and feelings. Moreover, most of this information may have no bearing on the victim's ability and tendency to recall

and tell the truth. (Accord, Caesar v. Mountanos, supra, 542 F.2d 1064; State v. Storlazzi, 464 A.2d 929 (Conn. 1983)); People v. District Court, 719 P.2d 722 (Colo. 1986).)

The information in CWS files was not compiled with a view towards law enforcement, but rather for the welfare of the child victim. The state has offered the child a helping hand, but not before it has probed into the very core of the child's private life and that of its family. To disclose this information to the accused abuser -- the very person from whom the state is intending to offer protection -- is to authorize a second and highly damaging assault on the child. Disclosure forces the child to choose between his rights of privacy and his right as a citizen and victim to

testify and have his abuser brought to justice. (People v. District Court, supra, 719 F.2d 722.)

Therefore, any disclosure of CWS files must be limited to only that information which is absolutely necessary to a fair assessment of the truth. Disclosure must also be limited to the parties and the purpose for which it was ordered.

II

THE SIXTH AMENDMENT RIGHTS OF CONFRONTATION AND COMPULSORY PROCESS DO NOT REQUIRE DISCLOSURE OF PRIVILEGED INFORMATION WITHOUT AN INITIAL SHOWING OF MATERIALITY, AN IN CAMERA HEARING, AND A BALANCING OF INTERESTS.

In the case before this Court, defense counsel for respondent Ritchie unsuccessfully sought pre-trial access to Child Welfare Services (CWS) records on the basis that:

> "There could be possible defense witnesses disclosed . . . there could be matters in [the child welfare services file] that would be favorable to the defendant." (Commonwealth v. Ritchie, supra, 502 A.2d 148, 154.)

On appeal, defense counsel argued that he should be granted access to the records for the narrow purpose of arguing relevance and materiality. (Commonwealth v. Ritchie, supra, at p. 149.) The majority of the Pennsylvania Supreme Court agreed, based on a fear that Ritchie's Sixth Amendment rights would be "diluted" unless defense counsel personally inspected the confidential files. The court reasoned that "review with the eyes and the perspective of an advocate" is required by the Sixth Amendment. Accordingly, the court failed to balance the competing interests and dispensed with the

necessity of a judicial in camera examination of the privileged material.

The position taken by the Pennsylvania Supreme Court is not supported by constitutional case law and if upheld would have a devastating effect on the government's ability to encourage and protect confidential communications of any kind.

A defendant's Sixth Amendment rights to compulsory process and confrontation are not absolute. (Washington v. Texas, 388 U.S. 14 (1967).) For example, these rights are qualified to the extent of existing testimonial privileges. (Id., p. 23, n. 21; United States v. Nixon, 418 U.S. 683, 709-710 (1974); Ohio v. Roberts, 448 U.S. 683 (1974).)

As this Court [has] recently stated in Delaware v. Fensterer, ____ U.S. ____, 106 S.Ct. 292 (1985), per curium:

> "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' [Davis v. Alaska, 415 U.S. 308, 94 S.Ct.1105, 39 L.Ed.2d 347 (1974) at 315-316 [94 S.Ct. at 1109-1110] (quoting 5 J. Wigmore, Evidence, § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish . . . . This conclusion is confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one . . . : the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused.'"

In situations where two competing interests exist, this Court has previously weighed the competing interests in order to preserve the essential integrity of both (Davis v. Alaska, supra, 415 U.S. 308; United States v. Nixon, supra, 418 U.S. 638, 711-712; McCray v. Illinois, 386 U.S. 300 (1967); Prince v. Massachusetts, supra, 321 U.S. 158).

In the instant case, the criminal defendant's right of access should be weighed against the state's interest in preventing and treating child abuse. In deciding whether access should be granted, a careful balance must take place which will "depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of

the [information sought], and other relevant factors." (McCray v. Illinois, 386 U.S. at 310, quoting Roviaro v. United States, 353 U.S. 53, 61 (1957).)

There is no fixed rule, and the problem calls for balancing the public interest against the individual's right to prepare his defense. (Roviaro v. United States, supra, 353 U.S. at 62.) The information sought must be relevant and helpful to the defense or essential to a fair determination of the cause in order to override the need for confidentiality. (Id. at 60-61.)

Moreover, the defense should be required to meet a high standard of evidentiary need in order to prevent "fishing expeditions" into privileged matters. The government has no

obligation to provide access to witnesses who possess no evidence material to guilt or innocence. (United States v. Valenzuela-Bernal, supra, 458 U.S. 858.)

The defendant must make some plausible showing that the information sought is both favorable to the defense and material to guilt in ways which are not merely cumulative. (Id., at pp. 867, 873; Washington v. Texas, 388 U.S. 14 (1967); Brady v. Maryland, 373 U.S. 83 (1963); United States v. Lindstrom, 698 F.2d 1154 (8th Cir. 1983); Camitsch v. Risley, supra, 705 F.2d 351.)

The information is material where it might affect the outcome of the trial (Moore v. Illinois, 408 U.S. 786 (1972); United States v. Agurs, 427 U.S. 97 (1976)), or reveals possible bias, prejudice, motive to lie or

inability to perceive and recount the truth. (Davis v. Alaska, supra, 415 U.S. 308.) In the instant case Mr. Ritchie failed to meet the above test. His claim was based on vague and speculative assertions of what "could be."

If, after balancing the competing interests and assessing the defendant's need, the court concludes disclosure may be proper, the court should then examine the privileged information in camera to determine what specific documents, if any, satisfy the requirements of relevance and materiality. In so doing, the court should take care to limit disclosure to only that which is absolutely necessary to a fair assessment of the truth.

This Court has approved the use of in camera procedures where the

materials sought are confidential. (United States v. Reynolds, 345 U.S. 1 (1953); United States v. Nixon, supra, 418 U.S. 683; New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978); Camitsch v. Risley, 705 F.2d 351 (9th Cir. 1983).)

An in camera hearing is essential to the preservation of confidentiality. Disclosure to defense counsel even for the limited purpose of arguing relevance would compromise the confidential interests involved.

The Sixth Amendment only requires disclosure of information that is material and relevant. (United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).) Disclosure of the entire file to defense counsel would give him/her access to all of the privileged material, most of which will have no

bearing on the case. This would be nothing more than an opportunity to engage in a "fishing expedition."

This Court has never construed the Sixth Amendment to require such broad intrusions into private matters. The disclosure of the fact of a juvenile adjudication (Davis v. Alaska, supra, 415 U.S. 308) does not compare with the disclosure of sensitive, informal information concerning fundamentally private matters. (Camitsch v. Risley, supra, 705 F.2d 351, 354.)

Moreover, defense counsel's preliminary access to the privileged information places him in an untenable position. On one hand, as an officer of the court (Cohen v. Hurley, 366 U.S. 117 (1961)) he is charged with the obligation of obeying any restrictive

orders of the court (Prof. Rules of Ethics, Bus. & Prof. Code, § 6103.) 5/ On the other hand, counsel takes an oath to represent his client to the best of his knowledge and ability. (Bus. & Prof. Code, § 6067.)

If counsel is given unrestricted access to privileged information, he will be faced with having information which the court will not permit him to use for his client's benefit, even though he knows that the information could provide a useful source of harassment, intimidation and embarrassment to the witness.

Moreover, if relevance cannot truly be assessed without "the eyes of an advocate," the advocate may often times need to consult with his client

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5. The court would presumably take steps to insure improper dissemination of the privileged matter.

in order to fully assess the relevance of certain information. Disclosure at this level would then defeat the very purpose of the privilege.

Information, such as the reporter's identity and the child's new address where he/she has been removed under emergency conditions, will be included in the social service files. Unrestricted disclosure of this information may place these individuals in danger of reprisal without cause.

An in camera hearing would allow the trial court to make a finely tuned case-by-case comparison of the relative weights of the competing interests. Fundamental social policy decisions as to which relationships are to be privileged fall within the special capacity of the legislature. The task and talent of the trial courts

lie in assessing the potential harm disclosure would impose on a particular witness whom the judge can examine. (30 Stan. L. Rev., supra.)

The trial court's analysis should therefore include an assessment of the defendant's specific need for the information in light of all the circumstances, balanced against the general importance of the privilege claimed, the particular privacy interests involved, and the harm of disclosure. Judicial in camera inspection of the privileged information as well as in camera defense argument will serve to protect both sides.

If, after an in camera hearing, the court allows disclosure, it should take steps to prevent further dissemination of the information.

Protective orders may be fashioned directing that the information only be disclosed in connection with the criminal proceedings and that the records produced for in camera inspection be sealed for appellate review.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Pennsylvania Supreme Court should be reversed.

DATED:

JOHN K. VAN DE KAMP
Attorney General
STEVE WHITE, Chief
Assistant Attorney General
ARNOLD OVEROYE
Assistant Attorney General
JOEL CAREY, Supervising
Deputy Attorney General

KAREN ZISKIND
Counsel of Record
Deputy Attorney General

Attorneys for Amicus Curiae
State of California ex rel.
John K. Van De Kamp,
Attorney General

Duane Woodard
Attorney General
State of Colorado

Joseph Lieberman
Attorney General
State of Connecticut

Corinne Watanabe
Acting Attorney General
State of Hawaii

Neil F. Hartigan
Attorney General
State of Illinois

Linley E. Pearson
Attorney General
State of Indiana

David Armstrong
Attorney General
State of Kentucky

William J. Guste, Jr.
Attorney General
State of Louisiana

James E. Tierney
Attorney General
State of Maine

Hubert H. Humphrey III
Attorney General
State of Minnesota

Edwin L. Pittman
Attorney General
State of Mississippi

Michael Greely
Attorney General
State of Montana

Stephen E. Merrill
Attorney General
State of New Hampshire

Lacy H. Thornburg
Attorney General
State of North Carolina

Mike Turpen
Attorney General
State of Oklahoma

LeRoy S. Zimmerman
Attorney General
State of Pennsylvania

Mike Cody
Attorney General
State of Tennessee

David L. Wilkinson
Attorney General
State of Utah

Jeffrey L. Amestoy
Attorney General
State of Vermont

William A. Broadus
Attorney General
State of Virginia

Kenneth O. Eikenberry
Attorney General
State of Washington

Charlie Brown
Attorney General
State of West Virginia

Archie G. McClintock
Attorney General
State of Wyoming